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No. 85-1822

In The
Supreme Court of the United States
October Term, 1985

CHARLES F. WILLIS, JR.,
Petitioner,

v.

THE CLEVELAND TRUST COMPANY
n/k/a AmeriTrust Company,
Executor of the Estate of
Harvey S. Firestone, Jr., Deceased

and

ELIZABETH FIRESTONE WILLIS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Article IV, Section 1, of the Constitution of the United States (Full Faith and Credit Clause) is implicated in a case in which both of the following are true:

(1) The propositions that Petitioner now claims violate the Full Faith and Credit Clause of the Constitution of the United States were conclusively established for purposes of this lawsuit by Petitioner's failure to timely respond to Requests for Admission properly served upon him pursuant to the Ohio Rules of Civil Procedures; and

(2) Respondent, The Cleveland Trust Company, was not a party to the earlier District of Columbia action relied upon by Petitioner nor was it in privity with any entity that was a party to that action.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Respondent, The Cleveland Trust Company (hereinafter "Cleveland Trust") respectfully submits that there are at least two reasons that the writ of certiorari sought in this case should be denied. First, there was an adequate, independent state ground of decision which bars this Court from reviewing petitioner's claim based upon Article IV, Section 1, of the Constitution of the United States. Second, petitioner's claim is founded upon a premise that respondent Cleveland Trust was in privity with respondent Elizabeth Firestone Willis in connection with previous litigation that occurred between petitioner and Mrs. Willis in the Federal District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia and that premise is erroneous.

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ARGUMENT STATING REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

(1) Adequate, Independent State Ground of Decision

It has long been established that a claim cannot be the basis for a proceeding before this Court unless that claim was properly raised and denied by the supreme court of the state in which the cause originated. As explained by this Court many years ago:

> This means that the claim must be asserted at the proper time and in the proper manner by pleading,

> motion, or other appropriate action under the state system of pleading and practice . . ., and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, ...

Atlantic Coast Line Railroad Company v. Mims, 242 U.S. 532, 535 (1917) (citations omitted).

The petitioner's position in this case is that the Ohio Courts violated the Full Faith and Credit Clause by finding facts that assertedly had been found differently in a previous case before the Federal Courts of the District of Columbia. As noted by the petitioner, the basis for the Ohio Courts' findings was petitioner's admission of the facts at issue through his failure to timely respond to Requests for Admission that had been properly served upon him pursuant to Rule 36 of the Ohio Rules of Civil Procedure. *Petition For Writ of Certiorari* at 14-15. (Rule 36 is reproduced as an appendix to this Brief.)

As stated by the Ohio Supreme Court in its decision in this case, Rule 36 of the Ohio Rules of Civil Procedure requires that a party respond to Requests for Admission served upon him, within the time designated, by either answering or objecting. If he does neither, the requests become admissions and may only be withdrawn under compelling circumstances. *The Cleveland Trust Company v. Willis*, 20 Ohio St. 3d 66, 67 (1985) (Appendix to Petition For Writ of Certiorari 1, 5). As stated by petitioner, he first raised the alleged *res judicata* effect of the District of Columbia actions, not in timely responses to Cleveland

Trust's Requests for Admission, but after the trial court had refused to let him file his untimely responses to Cleveland Trust's Requests for Admission. *Petition For Writ of Certiorari* at 16. At that point, it was too late. The facts he now asserts the Ohio Courts were precluded from relitigating by the District of Columbia decisions, were already "conclusively established" for purposes of this case. His admission of those facts could have been withdrawn only under compelling circumstances.

The Ohio Supreme Court analyzed the circumstances surrounding petitioner's failure to comply with Rule 36 of the Ohio Rules of Civil Procedure and found that the record disclosed "plain failure to respond to the requests without justification for the delay." Accordingly, it found that the trial court had not abused its discretion in refusing to permit petitioner to withdraw or amend his admissions and that judgment was properly entered against him. *The Cleveland Trust Company v. Willis*, 20 Ohio St. 3d 66, 68 (1985) (Appendix to Petition For Writ of Certiorari 1, 8). In effect, the Ohio Supreme Court found that petitioner had not raised his *res judicata* claim "at the proper time and in the proper manner." *See Atlantic Coast Line Railroad Company v. Mims*, 242 U.S. 532, 537 (1917).

The Ohio Court's refusal to let petitioner deny, or object to, the Requests for Admission because of his failure to comply with Rule 36 of the Ohio Rules of Civil Procedure, constitutes an adequate, independent state ground of decision which bars this Court from reviewing petitioner's claim based upon Article IV, Section 1, of the Constitution of the United States. His Petition For Writ of Certiorari, therefore, should be denied.

(2) Cleveland Trust Was Not In Privity With Elizabeth Firestone Willis In Connection With The District Of Columbia Action

During 1978, petitioner named Cleveland Trust as a defendant in a lawsuit that he had earlier, during 1976, filed against Elizabeth Firestone Willis in the United States District Court for the District of Columbia. Although Cleveland Trust timely moved for dismissal of the claim against it based upon the District of Columbia District Court's lack of personal jurisdiction over it, that motion was denied. The United States Court of Appeals for the District of Columbia, however, subsequently reversed the District Court's decision on the personal jurisdiction question and petitioner's Complaint, as it related to Cleveland Trust, was dismissed. *Petition For Writ of Certiorari* at 8-9. The District of Columbia action, as it related to Cleveland Trust, therefore, was a nullity. *See Industrial Credit Company v. Berg,* 388 F.2d 835, 842 (8th Cir. 1968).

Despite the fact that Cleveland Trust was not properly a party to the District of Columbia action, petitioner argues that that action has a *res judicata* effect upon claims between him and Cleveland Trust in this case. Specifically, petitioner asserts by his Petition For Writ of Certiorari that Cleveland Trust was in privity with Mrs. Willis, who was properly a party to the District of Columbia action, and, that as a result of that privity, was foreclosed from litigating certain of the facts that were admitted by petitioner through his failure to timely respond to its Requests for Admission. Even if petitioner had timely raised his *res judicata* argument, through objec-

tions to, or denials of, Cleveland Trust's Requests for Admission, however, the Ohio Courts would have been acting appropriately in rejecting it.

As stated by the United States Court of Appeals for the District of Columbia, and quoted by petitioner:

> [Privity] designates a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved.

Jefferson School of Social Science v. Subversive Activities Control Board, 331 F.2d 76, 83 (D.C. Cir. 1963) (citations omitted), quoted, *Petition For Writ of Certiorari* at 27. A key element of this required identity of interest is that the party sought to be foreclosed by the previous litigation must have, with rare exceptions, acquired its interest in the subject matter during or after the previous litigation. *Chase National Bank v. Norwalk,* 291 U.S. 431, 438-439 (1933); *Old Colony Trust Company v. Omaha,* 230 U.S. 100, 122 (1913). As noted by this Court in *Chase National Bank v. Norwalk:*

> [I]n every case where a[n] [interest] was [acquired] before the [previous] litigation . . . was instituted, the [party sought to be foreclosed] is entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him.

291 U.S. at 438.

Consideration of the circumstances of this case demonstrates why the above quoted rule exists. As is clear from the Summary of Facts furnished by petitioner, prior to

1969, Mrs. Willis occupied two roles in connection with the series of notes that preceded the 1969 note to the Firestone Bank. First, she was the owner, or part owner, of certain stock that was pledged as collateral for those notes. *Petition For Writ of Certiorari* at 5-6. Second, she served as a signer of those notes, whether it was as an accommodation party or as a maker. *Petition For Writ of Certiorari* at 6. With the signing of the 1969 note, Mrs. Firestone was replaced in her role as a signatory to the series of notes by her father, Cleveland Trust's decedent. She continued thereafter, however, in her role as the owner, or part owner, of the stock that had been pledged as collateral for the notes. *Petition for Writ of Certiorari* at 7.

At the time petitioner instituted the District of Columbia action against Mrs. Willis, she no longer had any motivation to contend that her role on the series of notes was that of an accommodation party as opposed to a comaker. In fact, it became clear during the litigation of this case before the Ohio trial court, that it was to Mrs. Willis' financial advantage as the owner or part owner of stock pledged as collateral for the 1969 note to argue that her father, as her replacement on that note, served as a comaker instead of an accommodation party. This was exactly opposite Cleveland Trust's position. If Mr. Firestone was a comaker of the 1969 note, Cleveland Trust would have only been entitled to a judgment for one-half of the amount it was called upon to pay in satisfaction of the 1969 note; since the Ohio courts found that Mr. Firestone was an accommodation party, Cleveland Trust recovered judgment in the full amount it had been called upon to pay. Inasmuch as Mrs. Firestone's interest in the

pledged stock was subject to the judgment in Cleveland Trust's favor, it would have been to her advantage for Cleveland Trust to have failed on the accommodation party issue. Clearly, at the time of the District of Columbia action, Mrs. Willis did not represent precisely the same legal right as Cleveland Trust holds in respect to the subject matter involved in this case.

Inasmuch as Cleveland Trust's decedent acquired his interest in the subject matter of the District of Columbia action a number of years prior to the filing of that action, Cleveland Trust was not foreclosed in this case from litigating any issues previously decided in that District of Columbia action. Even if there were not an adequate, independent state ground for decision in this case, therefore, the decision of the Supreme Court of Ohio would not be in violation of the Full Faith and Credit Clause of the Constitution of the United States.

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CONCLUSION

There was an adequate, independent state ground of decision in this case which bars this Court from reviewing petitioner's claim based upon Article IV, Section 1, of the Constitution of the United States. Further, even if there were not an adequate, independent state ground for decision, the decision of the Supreme Court of Ohio would be correct because Cleveland Trust was not properly a party to the action before the United States District Court for the District of Columbia and was not in privity with anybody who was properly a party to that action. Ac-

cordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Rule 36 of The Ohio Rules of Civil Procedure

RULE 36. REQUESTS FOR ADMISSION

(A) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial

shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer, or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(C), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

(B) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing

modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(C) Form of Answers and Objections to Requests for Admissions. The party submitting requests for admissions shall arrange them so that there is sufficient space after each request for admission in which to type the answer or objections to that request for admission. The minimum vertical space between requests for admissions shall be one inch.